



Zach Klein

Columbus City Attorney

77 N. Front Street, Columbus, Ohio 43215

614-645-7385 [cityattorney@columbus.gov](mailto:cityattorney@columbus.gov)

# CIVILIAN POLICE REVIEW BOARD: ARREST, SEARCH AND SEIZURE

Presentation by: Jeff Furbee, Columbus Assistant City  
Attorney, and Police Legal Advisor

# Starting Point— Interpreting the Fourth Amendment

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV (1791)

The right of the people to be secure in their persons,  
houses, papers, and effects, against unreasonable  
searches and seizures, shall not be violated, and no  
warrants shall issue, but upon probable cause, supported  
by Oath or affirmation, and particularly describing the  
place to be searched, and the persons or things to be  
seized.

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV (1791)

## Columbus Police Division Directive: Rules of Conduct

- **1.01 Obedience to Laws and Ordinances**
  - Division personnel shall obey the Constitutions of the United States and the State of Ohio and all federal, state, and local laws.
  - **1.18 Arrest, Search, and Seizure**
  - Sworn personnel shall make arrests, searches, and seizures only in accordance with law and Division policy and procedures.
-

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV (1791)

4<sup>th</sup> Amendment Regulates:

Searches of Persons and/or Property

Seizures of Persons and/or Property

What Are Searches and Seizures?

A Detention is a Seizure

An Arrest is a Seizure

A Use of Force is a Seizure

A Pat-Down or Protective Sweep is a Search

Search of a Vehicle/Person/House/Property/Protected Area is a Search

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV

**Chambers v. Maroney, 399 U.S. 42 (1970): What makes a search reasonable?**

In enforcing the 4<sup>th</sup> Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution.

As a general rule, it has also required the judgment of a magistrate on probable cause and issuance of a warrant before a search is made. Only in exigent circumstances will judgment of the police as to PC serve as sufficient authorization for a search.

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV

**4<sup>th</sup> Amendment Requires Probable Cause (PC) for four Different Purposes:**

- To obtain an arrest warrant
- To make a warrantless arrest
- To obtain a search warrant
- To conduct warrantless searches

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV

**PC to Search:** Police must have probable cause to believe that they will find evidence of crime at that time in the place they want to look/search (if it is a protected place) *before* they begin their warrantless search or in order to obtain a search warrant to search that area/place.

**PC to Arrest:** deals with acts previously committed by the suspect and the officer must show substantial and trustworthy evidence that the law has been violated, and the person to be arrested committed that unlawful act.



# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV

***State v. Caplinger***, 2018-Ohio-3230 (5<sup>th</sup> App. Dist.): The  
Supreme Court has identified three different types of  
police-citizen encounters:

Consensual Contact/Encounter

Investigatory Detention

An Arrest

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV

*U.S. v. Mendenhall*, 446 U.S. 544 (1980): Encounters are consensual where the police merely approach a person in a public place, engage the person in conversation, request information, and the person is free not to answer and walk away.

A person is seized when, in view of all the circumstances surrounding the incident, a reasonable person would believe that he/she was not free to leave.

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV

*Terry v. Ohio*, 392 U.S. 1 (1968): The investigatory detention, known as a *Terry* stop, is more intrusive than a consensual encounter, but less so than an arrest.

This type of encounter occurs when the officer has by either physical force or a show of authority restrained the person in such a way that a reasonable person would not feel free to terminate the contact.

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV

*Terry v. Ohio*, 392 U.S. 1 (1968):

The police may detain an individual when the officer has a reasonable suspicion, based upon specific, articulable facts that criminal activity is occurring.

This detention must be limited in duration and purpose, and can only take as long as necessary for the officer to confirm or dispel his suspicions.

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV

*Terry v. Ohio*, 392 U.S. 1 (1968):

The police may detain an individual when the officer has a reasonable suspicion, based upon specific, articulable facts that criminal activity is occurring.

This detention must be limited in duration and purpose, and can only take as long as necessary for the officer to confirm or dispel his suspicions.

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV

*Terry v. Ohio*, 392 U.S. 1 (1968):

The Court also allowed for a Pat-Down/Frisk in *Terry* so that officers conducting Investigative Detentions could protect themselves.

*Terry* requires an officer to articulate a reasonable belief that a suspect is armed and poses a threat *before* the officer is permitted to conduct a limited "Pat Down" of the suspect's outer clothing for weapons.

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV

**Beck v. Ohio, 379 U.S. 89 (1964):**

Whether an arrest is constitutionally valid depends in turn upon whether, at the moment the arrest is made, the officers have probable cause to make it - whether at that moment the facts and circumstances within their knowledge and of which they have reasonably trustworthy information are sufficient to warrant a prudent man in believing that the suspect has committed or is committing an offense.

# CONSTITUTION OF THE UNITED STATES OF AMERICA: AMENDMENT IV

- CONSENSUAL ENCOUNTER (free to go – no 4<sup>th</sup> Amendment)
- TERRY STOP/INVESTIGATIVE DETENTION (seizure = ras crime)
- TERRY FRISK/PAT-DOWN (ras = armed/dangerous)
- SEARCH (PC contraband evidence currently present)
- CHARGE/ARREST (PC criminal violation is/has occurred)
- CONVICTION (proof beyond a reasonable doubt)



# Street Level Policing Better Understood

# CONSENSUAL ENCOUNTERS

**Fla. v. Bostick, 501 U.S. 429 (1991):** A seizure does not occur simply because a police officer approaches an individual and asks a few questions.

So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required.

The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature. Not all personal intercourse between policemen and citizens involves "seizures" of persons.

# CONSENSUAL ENCOUNTERS

**U.S. v. Mendenhall, 446 U.S. 544 (1980):** Circumstances that might indicate a seizure (instead of a consensual encounter):

- The threatening presence of several officers;
- The display of a weapon by an officer(s);
- Some physical touching of the person;
- Restricting the subject's freedom of movement
- The use of language or tone of voice that indicates that compliance with the officer's request might be compelled;
  - Manner of questioning

# TERRY STOPS/INVESTIGATIVE DETENTIONS

- **Fla. v. Royer, 460 U.S. 491 (1983):** An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. The investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.
- **State v. Jones, 1999 Ohio App. LEXIS 5790 (1<sup>st</sup> App. Dist.):** The typical *Terry* stop remains a very brief detention, without handcuffs, sufficient for the police to ask a few questions relating to identity and the suspicious circumstances.

# TERRY STOPS/INVESTIGATIVE DETENTIONS

**Kowolonek v. Moore, 463 Fed. Appx. 531 (6<sup>th</sup> Cir. 2012):**

Most commonly, courts have found handcuffing and/or detaining a suspect in a police car permissible under *Terry* where there is a concern for officer safety because the suspect is thought to be armed. If a subject is unarmed, but nonetheless presents a risk to officer safety, handcuffing and detention in a cruiser may still be reasonable. Finally, a subject's attempt to flee or demonstrated flight risk may render handcuffing and detention in a cruiser objectively reasonable.

# TERRY STOPS/INVESTIGATIVE DETENTIONS

## **(Stop and I.D) ORC § 2921.29. Failure to disclose one's personal information**

(A) No person who is in a public place shall refuse to disclose the person's name, address, or date of birth, when requested by a law enforcement officer who reasonably suspects,,,, the following:

(1) The person is committing, has committed, or is about to commit a criminal offense.

# TRAFFIC STOPS

**Whren v. United States, 517 U.S. 806 (1996):**

Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of the Fourth Amendment's guarantee against unreasonable searches and seizures.

An automobile stop is subject to the constitutional imperative that the stop not be unreasonable under the circumstances.

# TRAFFIC STOPS

**United States v. Alexander, 528 Fed. Appx. 515 (6th Cir. Ohio 2013):**

A police officer may lawfully stop a car when he or she either has probable cause to believe that a civil traffic violation has occurred or reasonable suspicion of an ongoing crime.



# TRAFFIC STOPS

**Pa. v. Mimms, 434 U.S. 106, 106 (U.S. 1977):** Once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle.

**Md. v. Wilson, 519 U.S. 408 (U.S. 1997):** An officer making a traffic stop may order passengers to get out.

**State v. Lozada, 92 Ohio St. 3d 74 (Ohio 2001):** It is unreasonable for an officer to search the driver for weapons before placing him in a patrol car, if sole reason for placing driver in patrol car is for the convenience of the officer.

# TRAFFIC STOPS

**Chambers v. Maroney, 399 U.S. 42 (U.S. 1970):**

A search warrant is unnecessary where there is probable cause to search an automobile stopped on the highway.

Automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize.

# ARRESTS

- **Kinlin v. Kline, 749 F.3d 573 (6<sup>th</sup> Cir. 2014):**

Probable cause requires only the probability of criminal activity, not some type of prima facie showing. The Fourth Amendment requires only probable cause in light of the totality of the circumstances.

An officer must consider the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence, before determining if he has probable cause to make an arrest.

# ARRESTS

- **Arrests with a Warrant:** Most basic source of authority to arrest. Sanctioned by constitution.
- **Arrests without warrant (warrantless arrests):** At common law it was determined under certain circumstances it was impractical/impossible to obtain warrant prior to making arrest.
- **Revised Code Warrantless Arrests: ORC 2935.03:** Peace officers shall arrest and detain until a warrant can be obtained any person found violating a state law, municipal ordinance, or township resolution within the officer's jurisdiction.

# ARRESTS

## **Citation/Summons v. Arrests:**

- The issuance of the citation/summons is not an arrest.
- It is a written form, identifying the offense and ordering the person to whom it is issued to appear in a designated court, at a designated time and date.

# ARRESTS

## **Miranda v. Arizona (1966), 384 U.S. 436:**

Any time suspects are subjected to “custodial interrogation” they must be warned of their right to remain silent and that anything said can be used against them in a court of law. Suspects must also be told that they have the right to an attorney, and if they could not afford an attorney one would be appointed to them prior to any questioning if they so desired. (Miranda warnings).

# ARRESTS

- **United States v. Swanson, 341 F.3d 524 (2003)** -- The very nature of a *Terry* stop means that a detainee is not free to leave during the investigation, yet is not entitled to *Miranda* rights.
- **Rhode Island v. Innis (1980), 446 U.S. 291** -- Roadside questioning of a motorist by police is typically not considered a custodial interrogation.
- **State v. Weiland, 2016-Ohio-5034 (Ohio Ct. App., Stark County July 18, 2016)** -- Courts have generally found an individual is not in custody when questioning takes place in the individual's home and the individual is free to move about.

# Use of Force to Effect Detentions and Arrests



# USE OF FORCE

***Bolden v. Euclid*, 2014 Fed App. 0906N (6th Cir.)**

An officer making an investigative stop or arrest has the right to use some degree of physical coercion or threat thereof to affect it.

# USE OF FORCE

**Graham v. Connor, 490 U.S. 386 (1989):**

A use of force by an officer, which is a 4<sup>th</sup> Amendment seizure, must be objectively reasonable in light of the facts and circumstances confronting the officer.

If a use of force is found to be objectively unreasonable, it violates the Fourth Amendment's guarantee against unreasonable seizures, and is thus unconstitutional.

# USE OF FORCE

**Graham v. Connor, 490 U.S. 386 (1989):**

Relevant factors in deciding if force is reasonable:

- Severity of the crime suspected
- Whether the suspect is an immediate threat to safety of officer(s) or others,
  - Whether suspect is actively resisting
- Whether the suspect was attempting to evade arrest by flight.

# USE OF FORCE

**Graham v. Connor, 490 U.S. 386 (1989):**

“The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight....”

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving.

# USE OF FORCE

- **Columbus Division Directive 2.01 II. A.**
- 1. Sworn personnel shall attempt to de-escalate a situation by using trained techniques,,, when it is safe to do so.
- 3. Sworn personnel shall not use more force than is reasonable in an incident. Factors to be considered when determining the reasonableness of a use of force include:
  - a. The severity of the crime at issue.
  - b. Whether the subject poses immediate threat to the safety of the officer/others.
  - c. Whether the subject is actively resisting arrest.
  - d. Whether the subject is attempting to evade arrest by flight.
- 4. Sworn personnel shall not use any force for a retaliatory or punitive purpose.

# USE OF FORCE

**Goodwin v. City of Painesville, 2015 FED App. 0048P  
(6th Cir.):**

Active resistance to an officer's command can legitimize an officer's use of a Taser. Such resistance can take the form of verbal hostility or a deliberate act of defiance.

Noncompliance alone does not indicate active resistance; there must be something more. A deliberate act of defiance using one's body can constitute active resistance.

# USE OF FORCE

**Tennessee v. Garner, 471 U.S. 1 (1985):**

Deadly force only allowed to apprehend felons who police have probable cause to believe dangerous to them or to the public.

Court stated: “The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.”

# Home Entries and Related Searches



# HOME ENTRIES

**Brenay v. Schartow, 2017 U.S. App. LEXIS 17817 (6th Cir.):**

The police, like any Girl Scout, may approach a person's door, knock, and ask a question or two. But the 4<sup>th</sup> Amendment draws a firm line at the door.

Physical entry of the home is the chief evil against which the wording of the 4<sup>th</sup> Amendment is directed. If the government wants inside, they need a warrant, consent, or an exigent circumstance to justify their entry.

# HOME ENTRIES

**Steagald v. United States, 451 U.S. 204 (U.S. 1981):**

For U.S. Const. amend. IV purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

# HOME ENTRIES

## § 2935.12. Forcible entry in making arrest or executing search warrant

(A) When making an arrest or executing an arrest warrant,,, the peace officer,,, making the arrest or executing the warrant,,, may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make the arrest or to execute the warrant or summons, he is refused admittance, but the law enforcement officer or other authorized individual executing a search warrant shall not enter a house or building not described in the warrant.

# HOME ENTRIES

## **Criminal Rule 41. Search and seizure**

- **(A) Authority to issue warrant.** Upon the request of a prosecuting attorney or a law enforcement officer:
  - (1) A search warrant authorized by this rule may be issued by a judge of a court of record to search and seize property located within the court's territorial jurisdiction; and,

## **ORC 2933.22 Probable Cause**

- **(A)** A warrant of search or seizure shall issue only upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the property and things to be seized.

# HOME ENTRIES

***Greer v. City of Highland Park*, 884 F.3d 310 (2018):**

Officers executing a search warrant must knock and announce that they are seeking entry into a home and then wait a reasonable amount of time before entering. Furthermore, when officers execute a warrant at night, the length of time the officers should wait increases

# HOME ENTRIES

**Arthur Gregory Lange, Petitioner V. California, 594 U. S. \_\_\_\_**  
**(2021)**

- The flight (and associated hot-pursuit) of a suspected misdemeanant does not always justify a warrantless entry into a home. An officer must consider all the circumstances in a pursuit (when the PC is for a misdemeanor) to determine whether there is a law enforcement emergency.
- It still appears that pursuit of a fleeing *felon* is itself an exigent circumstance *always* justifying warrantless entry into a home.

# HOME ENTRIES

**State v. Kinnebrew, 2018-Ohio-121 (6<sup>th</sup> App. Dist.):** The "emergency-aid" exception allows officers to enter a dwelling without a warrant or PC when they reasonably believe that a person within the dwelling is in need of immediate aid.

**United States v. Bond, 433 Fed. Appx. 441 (6<sup>th</sup> Cir. 2011):** A search conducted based on free and voluntary consent is valid.

When the government offers consent as justification for the warrantless search of a defendant's property, the government must show the consent was voluntary.

# First Amendment/Protest Issues



# FIRST AMENDMENT ISSUES

- **Snyder v. Phelps, 562 U.S. 443 (2011):** Speech at a public place on a matter of public concern speech is entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.
- Even protected speech is not equally permissible in all places and at all times. A protestor's choice of where and when to conduct picketing is not beyond the Government's regulatory reach -- it is subject to reasonable time, place, or manner restrictions.
- Public places adjacent to a public street occupy a special position in terms of First Amendment protection. Public streets are the archetype of a traditional public forum.

# FIRST AMENDMENT ISSUES

**D.D. v. Scheeler, 2016 U.S. App. LEXIS 6882 (6th Cir.):**

There can be no disorderly conduct where the language is not threatening, does not constitute "fighting words" and is not likely by its very utterance to inflict injury or provoke the average person to immediate retaliatory breach of peace.

Police officers are held to a higher standard than average citizens, because the First Amendment requires that they "tolerate coarse criticism."

# FIRST AMENDMENT ISSUES

**Glik v. Cunniffe, 655 F.3d 78 (1<sup>st</sup> Cir. 2011):**

The First Amendment right to gather news is not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press.

Though not unqualified, a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.